Supreme Court, U.S.
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NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1995

JIMMY M. COZAD, Pro se,

Petitioner,

v.

ROBERT E. RUBIN, Secretary,
Department of the Treasury,
United States of America

Respondent.

PETITION FOR CERTIORARI TO THE UNITED STATES SUPREME COURT FROM THE UNITED STATES COURT OF APPEALS TENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

Jimmy M. Cozad
Pro se
Rural Route # 4
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4 ECP

QUESTIONS PRESENTED

1. Whether for Equal Protection analysis as contained in Section 1. of the XIV. amendment to the Constitution of the United States a Motion for Summary Judgment requiring proof of intent in addition to that of prima facie evidence without the ability to cross-examine and without benefit of counsel or full access to the personnel records of Respondent violates that section to the amendment.

2. Whether for Equal Protection analysis as contained in Section 1. of the XIV. amendment to the Constitution of the United States the Court of Appeals and Lower Court errored in viewing the evidence presented by the Defendant while con-currently excluding circumstantial evidence submitted by the Plaintiff, thus denying his equal protection rights.

3. Whether one who is not an employee of the Federal Government can be denied the right of a jury trial when filing for value in a cause of value as well as a cause for rights denied under the U.S. Statutes in an action against the Federal Government, as given by the VII amendment to the Constitution.

4. Whether the Petitioner has been denied those privileges and immunities afforded to those in the several states, in violation of Article IV, Section 2, of the United States Constitution.

LIST OF PARTIES

The petitioner is Jimmy M. Cozad

The respondent is ROBERT E. RUBIN, Secretary of the United States Department of the Treasury.

TABLE OF CONTENTS

PAGE(S)

QUESTIONS.....i
LIST OF PARTIES.....ii
TABLE OF CONTENTS.....iii
TABLE OF AUTHORITIES.....iv
OPINIONS BELOW.....1
STATEMENT OF JURISDICITON.....2
CONSTITUTIONAL AND STATUTORY
PROVISIONS INVOLVED.....3
STATEMENT OF THE CASE.....4
REASONS FOR GRANTING THE WRIT.....6
CONCLUSION.....10
APPENDIX.....A-C

TABLE OF AUTHORITIES

CASES	PAGE(S)
Braswell v Kobelinski (1976, DC Dist Col) 428 F Supp 324, 25 BNA FEP cas 387.	6
Nabors v United States (1978, CA9 Cal) 568 F2nd 657, 16 BNA FEP Cas 948, 16 CCH EPD para. 8106.	7
Lindahl v Air France (1991, CA9 Cal) 930 F2nd 1434, 91 CDOS 2821, 91 Daily Journal DAR 4545, 55 BNA FEP Cas 1033, 56 CCH EPD para. 40712.	8
Haglof v Northwest Rehabilitation, Inc. (1990, CA8 Minn) 910 F2nd 492, 54 BNA FEP Cas 1211, 54 CCH EPD para. 40123.	9

CONSTITUTIONAL PROVISIONS

Seventh Amendment, U.S. Constitution

Fourteenth Amendment, U.S. Constitution, Section 1.

Article IV., Section 2., U.S. Constitution

OPINIONS BELOW

The United States Court of Appeals, Tenth Circuit Order entered April 3, 1995, request for rehearing in banc denied, is reprinted in Appendix A.

The United States Court of Appeals, Tenth Circuit filed its unpublished Order and Judgment - on February 28, 1995, is reprinted in Appendix B.

The United States District Court for the District of Kansas entered July 28, 1994, Memorandum and Order, is reprinted in Appendix C.

The United States District Court for the District of Kansas entered June 29, 1993, Recommendation and Report, by United States Magistrate Judge, is reprinted in Appendix D.

STATEMENT OF JURISDICTION

The issue of an Order and Judgment affirming the lower court's Order of Summary Judgment by the 10th Circuit Court of Appeals on February 28, 1995 and the subsequent denial of a rehearing in banc was issued April 3,1995. This petition is being filed within 90 days threafter. The Court has jurisdiction pursuant to 28 USCS para. 1257 F. and I. and 28 USCS para. 1291, N53.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Fourteenth Admendment's Clause provides that: ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. Const., Amend. XIV, sec. 1.

2. Article IV., Section 2. of the United States Constitution states " The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."

3. The VII AMENDMENT to the Constitution of the United States states that "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of common law."

STATEMENT OF THE CASE

On the 8th day of December, 1992 Petitioner filed his Complaint alleging age discrimination. In conjunction with Plaintiff's Complaint and the allegations contained therein, Petitioner requested that the Court appoint counsel to represent him in this matter based upon his failure to obtain counsel and the good of the general public interest in assuring the Petitioner representation. That request for counsel was denied by the District Court. On the 18th of February, 1993 Respondent filed a Motion to Dismiss Petitioner's Complaint. On the 29th day of June, 1993, Respondent's Motion to Dismiss was denied by the District Magistrate Judge. On the 15th day of November, 1993 the Court issued it's scheduling Order. On the 14th day of February, 1994 the Respondent filed a Motion for Protective Order which was withdrawn on the 21st day of March, 1994. On the 16th day of May, 1994, a Pre-trial Conference was held and at that time the Respondent filed their Motion for Summary Judgment. Thereafter, on 28th day of June, 1994, the Respondent filed their second request for an extension within which to file documents relating to the Petitioner's claim of nepotism. Respondent's Motion for Summary Judgment was granted on the 28th day of July, 1994. Notice of Appeal was filed and docketed by the Court of Appeals on the 3rd and 19th of August, respectively. Thereafter on February 28th, 1995 the United States Court of Appeals for the Tenth Circuit issued a Order and Judgment upholding the Lower Court's granting of the Motion for Summary Judgment.

The unconstitutional violation of the equal protection clause and fairness clause has been raised by the granting of this motion as well as the violation of Petitioner's constitutional right to challenge under cross examination by trial process those statements made by the Respondent through the administrative hearing process and accepted by both the District Court and Court of Appeals as fact.

Also, the Lower Court's disregard of Petitioner's position as a Pro se litigant and it's inconsistent rulings with regard to the fairness clause is also challenged.

The freedom displayed by the Lower Court's to use the Summary Judgment Motion to deny access to the trial process by so narrowly defining the parameters by which a Plaintiff can access that process has a chilling effect on those who would assert their right afforded them by statute and constitutional privilege.

REASONS FOR GRANTING THE WRIT

The central issues in this case concern the rights of the individual to receive a fair and equal treatment when litigating against an agency of the United States as a Pro se litigant, and the Court's use of a Motion for Summary Judgment as the ultimate weapon given those agencies to avoid cross examination, thereby denying the Petitioners right of access to the trial process.

Petitioner established a case of prima facie evidence under the ADEA statute 29 USCS sec. 633a and Respondent failed in its attempt to present any sustainable evidence which would allow the case to be dismissed. As found in Braswell v Kobelinski (1976, DC Dist Col) 428 F Supp 324, 25 BNA FEP Cas 387. "plaintiff must make prima facie showing of age discrimination; burden then shifts to employer to show that age was not factor or that, even if age was factor, employee or applicant would not have gotten position for legitimate nondiscriminatory reason; employer must prove its case by clear and convincing evidence; employee then has burden of showing that employer's legitimate nondiscriminatory reasons are but pretext."

Petitioner would state that the only evidence submitted to the Court were those statements taken from its employees in defense of their case given during the administrative hearing process. Petitioner would contend that as such no evidence in fact exists beyond those statements. No depositions or evidence

has been submitted beyond the statements of Respondents which could establish clear and convincing evidence, and both the District Court and Court of Appeals have elevated those statements to a position of evidence without basis in fact, thus denying Petitioner's right to a fair and equal hearing. Petitioner would refer to Nabors v United States (1978, CA9 Cal) 568 F2nd 657, 16 BNA FEP Cas 948, 16 CCH EPD para. 8106. "Federal employee who filed complaint under ADEA (29 USCS paras. 621 et seq.) against Air Force was entitled to trial de novo, and accordingly it was improper for district court to review disposition of case by Civil Service Commission soley on basis of administrative record."

Petitioner would refer to the Memorandum and Order issued by the District Court and contanined in Appendix C. Review of this order Petitioner believes will show that the court abandoned its position of a trier of fact to that of an advocate of the Defense.

This order was issued without giving the Petitioner a hearing while the Petitioner was awaiting production of in camera evidence from the court. The court accepts and uses the statements contained in an administrative process and not those established at a hearing and accepts every statement made in that process as fact.

Statements contained in this order attributed to the Petitioner were not even taken verbatum from the record, but were changed and expanded upon and malign the character and credability of the Petitioner without proof in fact. The Petitioner would be willing to refute statements contained in this order as fact under oath in a court of law, and

believes the court to be grossly unfair and violates his rights of fairness under the Constitution.

Petitioner would submit to the Court that both the Court of Appeals and the Lower Court have been inconsistent in dealing with the evidence submitted by the Petitioner. The District Court in a Pre-Trial conference led Petitioner to believe that the violation of an agency's own rule and regulations could be submitted as circumstantial evidence that intent to discriminate did exist. Petitioner has submitted to the court evidence that the Respondent did in fact violate its own rules and regulations and those of the Merit System and Veterans Preference Statutes, thus showing a propensity to disregard the law governing personnel management including the Age Discrimination Statutes.

The Court of Appeals has misinterpreted the evidence of wrong doing by claiming that Petitioner subsituted that evidence as direct evidence. Additionally, Petitioner presented evidence in his support that the employment register of the Respondent was manipulated to allow for younger applicants to be hired.

Even the most restrictive case in favor of a Motion for Summary Judgment states ", but plaintiff need produce very little evidence of discriminatory motive to raise genuine issue of fact for summary judgment purposes." Lindahl v Air France (1991, CA9 Cal) 930 F2d 1434, 91 CDOS 2821, 91 Daily Journal DAR 4545, 55 BNA FEP Cas 1033, 56 CCH EPD para. 40712.

In the case of Haglof v Northwest Rehabilitation, Inc. (1990, CA8 Minn) 910 F2d 492, 54 BNA FEP Cas 1211, 54 CCH EPD par. 40123., in a ADEA case "it is not necessary to produce direct evidence of discriminatory intent or additional evidence beyond that presented in prima facie case;" The inconsistency by which the courts have required different degrees and types of evidence beyond prima facie evidence in order to receive the right to a trial is in conflict with Article IV, Section 2 requiring consistent treatment of the law between states and also violates the due process and equal protection provisions of Section I of the Fourteenth Amendment to the Constitution.

Further the Court of Appeals unfairly compares Petitioner's case involving a Federal Agency which is required by law to follow statutory and mandated personnel practices designed to preclude age discrimination as well as other forms of discrimination, with cases in its own circuit involving private companies who apparently have no such rules or regulations. By doing so the court of review has excluded unfairly Petitioner's only method by which a litigant could hope to prove intent, short of cross examination. A non-employee applicant for a Federal position does not have access to information which would normally be available to an employee and Federal Agencies have powers to effectively exclude information outside of the trial process.

Finally, although the Petitioner has been given the same rights in pursuing

his claim as that of a Federal Employee, Petitioner is not a Federal Employee and as such should be given that right afforded him under the Seventh Amendment to the Constitution. Petitioner has a claim in value in excess of twenty dollars as required by that amendment and therefore should be given the right of trial by jury.

CONCLUSION

Petitioner has presented a prima facie case to the Court. Thus requiring Respondent to prove it's case by clear and convincing evidence. The only defense presented were statements made during the administrative process. No testimony was presented other than those statements given in the administrative process. No testimony by unbiased or expert opinion, no testimony from outside references or witnesses. Therefore Petitioner would conclude no clear and convincing evidence existed. Even if the burden had been shifted to the Petitioner, Petitioner has presented depositions taken outside the administrative process in addition to that of an outside audit by Office of Personnel Management as evidence of intent to discriminate based upon age.

Petitioner believes Respondent has relied upon the ultimate weapon of the Motion for Summary Judgment and that Petitioner's odds of ever being heard by the Supreme Court, to unfairly deny Petitioner his day in court.

Respectively submitted.

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APPENDIX

United States Court of Appeals For The Tenth Circuit - Order - Entered April 3, 1995. . . . . A

United States Court of Appeals For the Tenth Circuit - Order and Judgment - Entered Feb.28, 1995. . . . . B

In The United States District Court For The District of Kansas - Memorandum and Order - Entered July, 28, 1994. C

In The United States District Court For The District of Kansas - Recomenmendation and Report - Entered Jun 29, 1993 . . . D

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

JIMMY M. COZAD,
Plaintiff - Appellant,

v.

LLOYD BENTSEN, Secretary of the United States Department of Treasure,
Defendant - Appellee.

No. 94-3271

ORDER
Entered April 3, 1995

Before SEYMOUR, Chief Judge, and McKay and HENRY, Circuit Judges.

This matter comes on for consideration of appellant's petition for rehearing and suggestion for rehearing in banc.

Upon consideration wherof, the petition for rehearing is denied by the panel that rendered the decision.

In accordance with Rule 35(b), Federal Rules of Appellate Procedure, the suggestion fro rehearing in banc was transmitted to all of the judges of the court who are in regular active service. No member of the panel and no judge in regular active service on the court having requested that the court be polled on rehearing in banc, Rule 35, Fedral Rules of Appellate Procedure, the suggestion for rehearing in banc was

transmitted to all of the judges of the court who are in regular active service. No member of the panel and no judge in regular active service on the court having requested that the court be polled on rehearing in banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing in banc is denied.

Entered for the Court

PATRICK FISHER, Clerk
s/ L. Balzano(sp?)
by _____
Deputy Clerk

APPENDIX B

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

JIMMY M. COZAD Plaintiff-Appellant,	)
	) No. 94-) 3271) (D.C.
LLOYD BENTSEN, Secretary of the United States Department of Treasury, Defendant-Appelle	) 92-1600-) MLB) (D.) Kansas

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ORDER AND JUDGMENT*

Before SEYMOUR, Chief Judge, MCKAY, and HENRY, Circuit Judges.

After examining the brief and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. See Fed. R. App. P. 34(a); 10th Cir. R. 34.1.9. The cause is therefore ordered submitted without oral argument.

Jimmy Cozad brought this action pro se under the Age Discrimination Employment Act (ADEA), 29 U.S.C. sections 621 et seq., alleging that he was denied employment as an Internal Revenue

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*This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and

collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of the court's General Order filed November 29, 1993. 151 F.R.D. 470

Agent because of his age. The district court granted summary judgment for defendants. On appeal, Mr. Cozad argues that summary judgment was improper because he presented sufficient evidence to raise a fact issue on whether the reasons proffered by defendants for refusing to hire him were pretextual.

We have carefully reviewed the record and the analysis and authorities relied on by the district court, and we affirm the grant of summary judgment substantially for the reasons set out in the lower court order. Summary judgment for a defendant is proper in a ADEA action when, as here, there is nothing in the record to indicate that the legitimate reasons offered by the defendant to support an adverse employment decision are a pretext for illegal discrimination. See Palochko v. Manville Corp., 21 F.3d 981, 982-83 (10th Cir. 1994).

Mr. Cozad bases his claim of pretext upon asertions that defendants failed to follow their own procedures with respect to other job applicants, passed him over when he was entitled to a veteran's preference, and hired other instead of him due to nepotism. None of those allegations, taken as true, constitue evidence that defendant's reasons for failing to hire Mr. Cozad were a pretext for illegal age discrimination. The fact that a defendant's reasons may have been irrational, or not attributable to

legitimate business considerations, or even a pretext for nepotism does not create a jury question on discriminatory pretext absent some evidence that the reasons were motivated by a discriminatory animus. See EEOC v. Flasher Co., 986 F.2d 1312, 1319-21 (10th Cir. 1992). "(T)he plaintiff must show not merely that the proffered reasons are pretextual, but that they are 'a pretext for discrimination.'" Id. at 1321 (quoting Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981), and adding emphasis). Mr. Cozad has offered no evidence that the actions of defendants were motivated by his age. Summary judgment was therefore proper.

The judgment of the district court is AFFIRMED. The mandate shall issue forthwith.

Entered for the Court

Stephanie K. Seymour
Chief Judge

FILED
United States Court of Appeals
Tenth Circuit

FEB 28, 1995

PATRICK FISHER
Clerk

APPENDIX C

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF KANSAS

JIMMY M. COZAD, Plaintiff,

v.

LLOYD BENTSEN, SECRETARY, DEPARTMENT OF TREASURY, Defendant.

FILED
JUL 28 1994
RALPH L. DeLOACH, CLERK
By_____Deputy

CIVIL ACTION
No.92-1600-MLB

ENTERED ON THE DOCKET
DATE: 7-28-94

MEMORANDUM AND ORDER

This case comes before the court on the defendant's motion for summary judgment, pursuant to Fed. R. Civ. P. 56. (Doc. 33)

Jimmy Cozad applied for a job as a Internal Revenue Agent (IRA) in respose to a vacancy announcement posted on or about November 7, 1990. Cozad was 51 years old at the time of his application. Based on his prior work emperience, education, and military service, Cozad's application was rated and scored a 97. This was the highest score among the applicants. He also qualified a "tentative preference candidate" based on his military service.

Cozad, along with 21 other external candidates and 16 internal candidates, was interviewed for a position on January 4, 1991. One of the purposes of the interview was to determine if the applicant possessed effective "meet and deal" skills required of an IRA. Cozad's interview was conducted by Carol Ebel and Daniel Wiseman. Ebel is a group manager

with ten years experience of supervising IRAs and had participated in numerous prior interview panels.

Wiseman is also a group manager with eight and a half years experience as an IRA. He had not previously participated in an interview panel. Standard interview questions were asked of each applicant. The applicant's passage or failure of the interview is based soley upon the interview team's assessment of his or her "meet and deal" skills.

Following Cozad's interview, Ebel and Wiseman discussed the interview and concluded that Cozad did not possess the necessary communication skills to become an IRA. Ebel and Wiseman took notes of the interview and prepared a ranking panel form. From that information, an Agency Request to Pass Over a Preference was prepared and submitted to the Regional Exam Unit (REU) in Dallas. The REU sustained the request to pass over Cozad.

Cozad thereafter commenced this lawsuit, alleging the IRS had discriminated against him based on his age when he was not selected to be an IRA.

Standards for Summary Judgment

Rule 56(c) of the Federal Rules of Civil Procedure directs the entry of summary judgment in favor of the party who "show[s] that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." A principal purpose "of the summary judgment rule is to isolate and dispose

of factually unsupported claims or defenses . . . . " Celotex Corp. v. Catrett, 477 U.S. 317, 323-24 (1986). The court's inquiry is to determine "whether there is the need for a trial--whether, in other words, there are any genuine factual issues that

properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1986). Entry of summary judgment is mandated, after an adequate time for discovery and upon motion, against a party who fails to make a showing to establish the existence of an element essential to that party's case, and on which that party bears the burden of proof at trial. Meredith v. Beech Aircraft Corp., 18 F.3d 890, 893 (10th Cir. 1994).

The moving party bears the initial burden of demonstrating the absence of a genuine issue of material fact by informing the court of the basis for its motion. Martin v. Nannie and the Newborns, Inc., 3R.3d 1410, 1414 (10th Cir. 1993). Once the moving party properly supports its motion, the nonmoving party "may not rest upon mere allegation or denials of his pleading, but must set forth specific facts showing that there is a genuine issue for trial." Lee v. ABF Freight System, Inc., 22 F.3d 1019, 1021 (10th Cir. 1994). The court reviews the evidence in a light most favorable to the non-moving party, e.g., Thrasher v. B & B Chemical Co., Inc., 2 F3d 995, 996 (10th Cir. 1993), under the substantive law and the evidentiary burden applicable to the particular claim. Anderson, 477 U.S. at 255.*(1)

*(1) The court is cognizant that Cozad appeared pro se in this case. Accordingly, the court has liberally construed his response to the government's motion. See Hall v. Bellmon, 935 F.2d 1106, 1110 (10th Cir. 1991).

The court held a status conference on May 16, 1994, and advised Cozad of the form his response was to take. Notwithstanding this direction, Cozad failed to respond to the government's satement of uncontrovierted facts, as required to D. Kan. Rule 206(c).

Discussion

The ADEA forbids an employer to "discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, condiditons, or privileges of employment, because of such individual's age." 29 U.S.c. para. 623(a) (1). To establish age discrimination, Cozad must prove that age was a determining factor in defendant's failure to hire him. Perrell v. FinanceAmerica Corp., 726 F.2d 654, 656 (10th Cir. 1984). Cozad need not prove that age was the sole reason for the defendant's acts, but he must prove that age was a determinative factor in the defendant's decision. Cooper v. Asplundh Tree Expert Co., 836 F.2nd 1544, 1547 (10th Cir. 1988.).

Cozad's claim must be analyzed under the burden-shifting framework set forth in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). Under this framework, Cozad has the burden of establishing a

prima facie case of discrimination. If Cozad establishes a prima facie case, the burden shifts to the defendent to produce evidence of a nondisriminatory reason for its actions. Id. at 802. Once the defendant has set forth a facially nondiscriminatory reason for its decision, Cozad assumes the burden to prove the the employment decision was the result of intentional discriminatin based on age. Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 256 (1981).

To establish a prima facie case, Cozad must show that: (1) he was within the protected class; (2) he was qualified for the position; (3) he was rejected; (4) the position was filed by someone who was not a member of the protected class. See Kenworthy v. Conoco, Inc., 979 F.2d 1462, 1469 (10th Cir. 1992).

Defendant argues that Cozad failed to establish a prima facie case of age discrimination because he failed to prove that he was rejected for the position of IRA under circumstances that give rise to Discrimination. In support of this argument, the defendant delineates the circumstances surrounding Cozad's rejection, particularly Ebel's and Wiseman's conclusion that Cozad lacked the communication skills required of an IRA.

In the court's view, the defendant's argument is premature. In MacDonald v. Eastern Wyoming Menatl Health Center, 941 F.2nd 1115 (10th Cir. 1991), the Tenth Circuit stated that district courts should not consider a defendant's proffered reasons for rejection in assessing the plaintiff's prima facie case. Id. at 1119-1121. For purposes of evaluating whether Cozad was rejected pursuant to discriminatory motives at this stage, the court considers only the evidence offered by Cozad. He was 51

years old at the time of his rejection and possessed the requisite qualifications by virtue of his score on the application. It is uncontroverted that several of the applicants who were ultimately selected as IRAs were outside the protected class. Based on this evidence, the court finds Cozad has established a prima facie case.

The burden of production now shifts to the defendant to come forward with legitimate, nondiscriminatory reasons for Cozad's rejection. Defendant conducted interviews with the 22 external and 16 internal candidates for IRA positions. Each candidate was interviewed by two IRS employees and asked the same questions. One of the purposes of the interview was to ascertain whether the candidate possessed effective "meet and deal" skills. Defendant argues Cozad failed to demonstrate effective "meet and deal" skills required to be an effective IRA. Cozad was interviewed by Ebel and Wiseman, two experienced IRAs. Both took notes of Cozad's interview. They noted that Cozad's responses were rambling and unresponsive to the questions. They provided specific examples of Cozad's responses. For instance, when asked to describe his background, Cozad explained that he worked for Superior School Supplies, Inc., the commitment the company made to him, the different changes he made, the products it made, why his job was terminated, and related an incident involving an argument the owner's wife had with a nun about whether to move the business. The agents were forced to remind Cozad that they wanted a brief discussion of his experience.

Ebel and Wiseman also noted that Cozad made insensitive and unprofessional remarks during the interview. When asked to describe his weakest point, he replied

it was organizaton. When pressed to elaborate, he stated that his organizational skills threatened his co-workers and was therefore a weakness. Ebel and Wiseman asked the question again, and Cozad answered by describing an error made by a revenue agent during an audit. In another example, Cozad responded to a problem solving question an a grocery store by stating that he would use an indirect methos and had seen revenue agensts do likewise. Cozad went on to say that whenever he had a client in the past taht had a double entry set of books, he informed the client not to worry because revenue agents would not be able to find anything. Cozad stated revenue agents were not trained to know how to handle such complex situations.

In summary, Ebel and Wiseman were of the opinion that did not demonstrate diplomacy, flexibity, or good listining skills. They found Cozad did not directly answer their questions, and disregarged the opinions of others in a manner that impeded interactive communication.

Cozad does not challenge the accuracy of the comments attributed to him during the interview about his employment with Superior School Supplies and that co-workers viewed his desire for well-organized office environment negatively at first. He does not recall if he made a comment that an agent had missed that a taxpaper had increased his beginning inventory figure, or that he usually reorganizes the filing and paperwork in a new company when he first goes to work for them. He does recall restating that an IRS office worker, not an agent, failed to catch a double-entry bookkeeping system and detect errors.

Four other applicants besides Cozad failed to pass the interview. The ages

of these four applicants was 40, 38, 34, and 27, respecively. Those that passed the interview did not automatically become IRAs. The selections decisions were made by Richard Lee, Chief of the Examination Division. He selected six external candidates as IRAs, whose ages were 37, 28, 24, 23, 23, and 22, and five internal candidates, whose ages were 50, 49, 48,

32, and 32, respectively. Ebel and Wiseman interviewed and passed three of the external candidates, whowe ages were 37, 23, and 22, and two of the internal candidates, whose ages were 50 and 32, respectively.

The burden now shifts to Cozad to show that the defendant's reasons are a pretest for age discrimination. To avoid summary judgment, Cozad must produce "specific facts showing that there remains a genuine issue for trial" and evidence "'significantly probative' as to any [material] fact claimed to be disputed." Palochko v. Manville Corp., 21 F3d 981, 982 (10th Cir. 1994) (quoting Branson v. Price River Coal Co., 853 F.2nd 768, 771-72 (10th Cir. 1988)). Mere conjecture that the defendant's explanation is a pretext for age discrimination is an insufficient basis for denial of summary judgment. Id,

Cozad offers a number of exhibits that he contends show the defendant acted with discriminatory motive. Cozad points to a letter from the Office of Personnel Management (OPM) stating that a certain appointment in July, 1989, was illegal. The letter reflects that a temporary employee was given a career conditional appointment in violation of government

regulations. Cozad argues this letter tends to show that defendant was not properly following OPM guidelines during the period of his interview.

The court rejects the expansive interpretation of the letter urged upon it by Cozad. It does not follow that since the defendant illegally hired a person within the year prior to Cozad"s application, the defendant´s employment decision regarding Cozad

carries the taint of age discrimination. See Johnson v. Lehman, 679 F.2d 918, 922 (D.C. Cir. 1982). The letter makes no reference to any facts that could raise the specter of age discrimination.

Cozad argues the desposition of Ronda Grimes shows that defendant´s actions were likely taken to cover the existence of a discriminatory motive to hire a younger population of applicants for employment. The court disagrees. There are not facts in the deposition to support an inference of age discrimination. When asked whether she knew the ages of the applicants selected over Cozad for the IRA position, Grimes replied that she did not.

Cozad contends the defendant failed to take special care to recognize his veterans´ preference.*(2) In support of this contention, he attaches his application for federal employment (SF-171) and a cover page attached to the passover approval form explaining the reasons for passover. The application form is irrelevant to the issue of whether the defendant practiced age discrimination. The cover page is a summary of Ebel and Wiseman´s conclusions about Cozad´s interview. Nothing on the page can even remotely be construed as

mean Cozad was rejected due to his age. The cover letter must also be read in conjunction with the Request to Pass, in which Ebel and Wiseman described in considerable detail their decision to fail Cozad.

Cozad introduces a letter he wrote to Senator Nancy Kassebaum

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*(2) This court has previously dismissed any claim for relief based on the Veterans" Preference statutes. (Doc. 13-14)

detailing the defendant´s alleged noncompliance with the law. The letter recounts Cozad´s efforts to obtain the IRA position and complains at the delay and inattentiveness to his requests. Cozad offers his personal opinion that the IRS obstructed his applicantion and gave unauthorized treatment to another applicant. Cozad also sets forth portions of an afficavit given by Ebel explaining what she had done in response to Cozad´s inquires.

Conspicuously absent from these exhibits is any evidence that tends to indicate Cozad´s age was a factor in his rejection. Cozad may feel he has been shabbily treated by government officials, but his generalized grievances do not give rise to an inference of age discrimination.

Cozad points to the disposition of Bruce Thomas, the District Director of the Wichita IRS office, who stated that he advised that Cozad had filed an EEO complaint. Thomas testified he had been advised by Merle Simpson, Chief of the Personnel Management Section of Wichita IRS office, "why you weren´t selected and

so forth and that it would go forward and that it would be one of several." Cozad interprets this last phrase to inticate possible wide spread abuse of the hiring process.

By no stretch of the imagination can this remark be construed as evidence of age discrimination. Thomas was simply relating what he heard from Simpson about Cozad's situation. The mere fact that several other persons filed complaints with the EEO does not tend

to show that Cozad was rejected because of his age.*(3)

Cozad complains about certain unspecified commments made by Merle Simpson in his deposition that he contends reflect a lack of proper training and knowledge of OPM requirements. Additionally, he alleges neither Ebel and Wiseman nor management possessed the proper skills necessary to make an unbiased assessment of his qualifications. Cozad offers no suport for these bald accusations, and they are contradicted by the evidence in the record. First, with respect to Ebel's and Wiseman's qualificatons, Ebel had ten years of supervising IRSs at the time of Cozad's interview. She had participated in numerous interview panels and was the lead instructor for na interviewing course given to group managers. Wiseman was also a group manager and had eight and and half years experience as an IRA. Both wer more than qualified to evaluate Cozad's qualifications to be an IRA. Second, Simpson's depositon offers nothing to substantiate a charge of age discrimination. Simpson did not know whether his agency might be top heavy with older agents and had never seen any

statistics on age in the organizations.*(4)

Cozad points to a statement supporting the passover of another condidate and contends the reasons contained thereiun are opposite to that given for passing over him and also show pretext. The

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*(3) Cozad makes no effort of identify who these persons were or what the substance of their EEO Compaints were.

*(4) Such evidence is irrelevant in any event because Cozad makes a disparate treatment claim, not a disparate impact claim. See Hazen Paper Co. v. Biggins, __U.S.__, 123 L. Ed.2nd 338, 246 (1993) (Citation omitted).

statement reflects that the interview panel concluded the applicant lacked the self-confidence, assertiveness, and problem solving skills to become a satisfactory IRA. The statement quite plainly does not support an inference of age discrimination in Cozad's case. Nowhere in the statement is ther any reference to the applicant's age, any remarks suggesting an animus towards persons over 40, or any identification of the interview panel. Cf. Mitchell v. Toledo Hosp., 964 F.2d 577 (6th Cir. 1992) (to make a comparison of discrimination between plaintiff's treatment to that of other applicants, the plaintiff must show that the "comparables" are similarly-situatied in all respects). to the extent Cozad believes age was a factor in the rejection of applicant, his belief is purely speculative.

Finally, Cozad puts forward evidence purporting to show that the defendant;s actions were a pretext to hire an unqualified applicant who had a relative working in the Wichita office. The exhibit is portion of an application submitted by the candidate. Cozad notes the candidate applied for the position prior to her graduation and was not hired for the position she applied for.

Cozad's charge of nepotism is false. The applicant did not have any relative working for the United States government. More importantly, Cozad fails to explain how the defendant's treatment of that applicant has any tendency to show that its rejection of him was motivated by age discrimination. The court finds no such connection between the two applicants.

The defendant's motion (Doc.33) for summary judgment is

hereby granted.

IT IS SO ORDERED.

At Wichita, Kansas, this 28th day of July, 1994.

/s/

Monti L. Belot
United States District Judge

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

JIMMY M. COZAD,
Plaintiff,
vs.
LLOYD BENTSEN, SECRETARY OF THE TREASURY, et al.,
Defendants

FILED
U.S. DISTRICT COURT OF KANSAS
Jun 29 9 50 AM '93
RALPH L. DELOACH CLERK
/s/
BY_____
DEPUTY AT WICHITA, KS.

CAse No. 92-1600-MLB

RECOMENMENDATION AND REPORT

Defendant filed a motion to dismiss plaintiff's complaint on February 18, 1993 (Doc. 6). A response was filed on March 8, 1993 (Doc. 7). A reply was filed on March 19, 1993 (Doc.8). Plaintiff filed a further response on March 26, 1993 (Doc. 9). This matter was referred by Judge Belot to Judge Reid for a recommendation on the dispostion of this motion. The court heard oral argument from the parties on June 28, 1993.

Plaintiff alleges discrimination stemming from the failure of the Internal Revenue Service to hire him on January 10, 1991. Defendant first argues that only proper party should be the Secretary of Treasury, and that the case should be

dismissed against other named defendants. Plaintiff admits that the Secretary of Treasury is the only proper defendant, and that the other named defendants should be dismissed from the case.

Defendant also seeks dismissal of plaintiff's alleged claim

for relief under 5 U.S.C. paras. 3317 and 3318, the veterans preference statutes. Plaintiff states that he has not stated a claim for relief under these statutes. Therefore, to the extent that plaintiff's complaint does seek a claim for relief under the veterans preference statutes, that claim shall be dismissed.

The final issue before the court is the defendant's claim that plaintiff's age discrimination case must be dismissed for failing to comply with 29 U.S.C. para. 633a(b) and (c), and for failing to comply with 29 U.S.C. para. 633a(d) [Age Discrimination in Act(ADEA)]. Under the former, a claimant involkes the EEOC's administrative process, and can then file a civil action in federal district court if he or she is not satisfied with his administrative remedies. Under the latter, the claiment can present their claim to a federal court in the first instance. Stevens v. Department of the Treasury, 111 S. Ct. 1562, 1566 (1991).

The plaintiff in this case has invoked the EEOC's administrative process. The Defendant contends that the plaintiff could not initiate a civil action under 29 U.S.C. para. 633a(b) and (c) because the plaintiff had not exhausted his administrative remedies when the suit was filed. At the time the motion was filed, a request for reconsideration was pending before the EEOC. However, that request was denied

on May 6, 1993, as the parties noted in oral argument on this motion. The position of the government is that unless administrative remedies are exhausted when the lawsuit is filed, this court lacks jurisdiction over the case, even if

administrative remedies are exhausted sometime after the lawsuit has been commenced. See McNeil v. United States, 113 S. Ct. 1980, 1983 (1993) (claim brought under the Federal Tort Claims Act).

In the case of Stevens v. Department of the Treasury, the Court noted that there is a split in authority among the circuits as to whether or not a claimant must exhaust his administrative remedies before filing suit unde the ADEA. In Stevens, the Government had argued below that a claimant must exhust their administrative remedies before filing suit under the ADEA. However, the Government changed its position when the case was argued before the Supreme Court. "According to the Solicitor General, a federal employee who elects agency review of an age discrimination claim need not exhaust his administrative remedies before bring a civil action." 111 S. Ct. at 1568.

Now, in this case, the Government has apparently again changed its position. The court is quite concerned with this change of position. If the Solicitor General has articulated a position before the Supreme Court, then Government attorneys throughout the country should be bound by that position absent a decision by the Justice Department to depart from that position. Absent documentation from the Justice Department that such a change of position

has occurred, this court is not inclined to accept the position being argued by the local assistant U.S. attorney as being the position of the Government. Neither will this court look favorably on the Government repeatedly changing their position in various ADEA cases nationwide depending on the circumstances of

each case.

In her reply brief, the assistant U.S. Attorney notes the position taken by the Solicitor General in Stevens, but argues that the government's position was that it was not necessary to exhaust administrative remedies if the plaintiff meets the requirements to file suit directly in federal court (Doc. 8 at 4). However, such a distinction is nowhere metioned in Stevens. According to the Solicitor General in Stevens, a claimant who elects agency review of age discrimination claim need not exhaust his administrative remedies before bringing a civil action. The opinion does not indicate that the Solicitor General felt that administrative remedies would have to be exhausted if the plaintiff did not meet requirements to file suit directly in federal court. Counsel has offered no convincing rationale for requiring a claiment to exhaust their administrative remedies only if they do not meet the requirements to sue directly in federal court.

During oral argument, the court asked counsel for the defedant what was the basis for her opinion that the Solicitor General meant to limit his position-that exhaustion of administrative remedies is not required-to those situations where the claiment meets the requirements to file

suit directly in federal court. Counsel's only response was to attempt to distinguish Stevens, noting that Stevens was a case involving a government employee, while this case involved an applicant for government employment. However, 29 U.S.C. para. 633a applies to"[a]ll personnel actions affecting employees or applicants for

employment". Therefore, Stevens cannot be distinguished on this basis. The court was also perplexed at the attempt by the governmant to distinguish Stevens, since the government has cited that opinion in its reply brief in support of its position.

Because the Government changed their position on this issue in Stevens when it reached the Supreme Court, the court decided that the exhaustions issue was moot. However, Justice Stevens, in a concurring and dissenting opinion, would have gone ahead and ruled on the issue. As he noted, the ADEA, unlike Title VII, has no express requirement that a claimant seek administrative relief. In addition, the EEOC, in interpreting the ADEA, does not read the statute to require exhaustion by a claimant. See 29 C.F.R. para. 1613.513 (1992). This court agrees with Justice Stevens that under the ADEA, a claiment need not exhaust his or her administrative remedies before filing their civil action.

The Court further finds that 29 U.S.C. para. 633a(d) has no application to this case. That statute begins as follows: "When the individual has not filed a complaint concerning age discrimination with the [Equal Employment Opportunity] Commission, no civil action

may commenced by any individual under this section until... ." Since the plaintiff has filed a complaint with the EEOC, plaintiff need not comply with subsection (d) before filing his lawsuit.

IT IS THEREFORE RECOMMENDED that defendant's motion to dismiss is granted in part and denied in part. All named defendants, except that of the Secretary of the Treasury, are dismissed from

this case. In addition, to the extent that the complaint does seek at claim for relief under 5 U.S.C. paras. 3317 and 3318, that claim shall be dismissed. However, the remainder of the motion to dismiss the complaint in its entirety for lack of subject matter jurisdiction is denied.

Copies of this order shall be mailed to plaintiff and to counsel of record for the defendent. Pursuant to 28 U.S.C. para. 636(b)(1), the parties may serve and file written objections to the proposed findings and recommendations within 10 days after being served with a copy of this recommendation.

Dated at Wichita, Kansas, on June 28, 1993.

/s/

JOHN THOMAS REID
United States Magistrate Judge